In the Supreme Court of the United States

No. 78-904

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE,
Petitioner,

VS.

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CASES

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This reply to the brief in opposition is offered, because of the recognized importance of respondents' added question No. 2.

> "Whether plaintiffs have a personal stake in the controversy by reason of the prospect of spreading expenses of litigation among more claimants."

These expenses consist of what is described as "generally non-taxable, out-of-pocket expenses". The "spreading" refers to the shifting of expenses to others of the "class" who might fail to opt out on notice after a certification of the case as a class action. The "prospect" is that the Court might require these solicited parties to share the expense of securing the class certification.

The facts are not in dispute. The defendant has tendered to the named plaintiffs all that they demand, plus legal court costs, which is all that could ever have been recovered against the defendant in the case before the Court.

There is nothing left for the named plaintiffs to recover which can be recognized as an item in litigation. The so-called "generally non-taxable, out-of-pocket expenses" are not recoverable items in litigation.

The extreme importance of the question lies with the fact that if "generally non-taxable, out-of-pocket expenses" can supply the required personal stake ingredient of a case or controversy, *then no class action attempt could ever become moot, because every such attempt will, of necessity, involve some such generally non-taxable, out-of-pocket expenses.*

Of equal concern, and for like reason, is the hypothesis that the self-appointed class champions run the risk of loss of "personal respect and credibility" for having failed to obtain certification. This emotional factor could also be suggested in every case to prevent the case from ever becoming moot.

If either of these concepts is allowed to prevail, mootness will be totally foreign to all cases cast in class action form.

The Fifth Circuit said that if a defendant may "short circuit" a class action by paying off the class representative, and if it were so easy to end class actions, few would survive. While this view that some way must be found for class actions to survive does not expressly adopt respondents' argument, it is consistent with it.

There is, of course, the possibility that class action attempts will, from time to time, perish in this fashion. On the other hand, if the Fifth Circuit's philosophy becomes the law of the land, then *every* class action will survive and live on to a ripe old age.

Is it better that some class actions perish or that all Rule 23(b)(3) class actions survive at any cost?

This Court has the opportunity in this case to make the choice. Will the Court adhere to the "personal stake" test for jurisdictional purposes and thereby permit some Rule 23(b)(3) class action attempts to perish, or will the Court embrace the "nexus" test and adopt the philosophy that whenever a complaint is filed as a class action, a way must be found to keep it alive after death of the controversy between the named parties before the Court?

The only subject matter involved here is the recovery of money. Therefore, the personal stake must be a money stake, because there is nothing else involved out of which to construct a case or controversy. Therefore, when the named plaintiffs no longer have a personal money stake in the outcome, the case as to them is moot.

To maintain a money stake, the plaintiffs' financial interest must be real and direct. In *O'Shea* v. *Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974), the Court, after announcing this rule, applied the jurisdictional truism to class actions, saying:

> ". . . Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962); Indiana

> Employment Division v. Burney, 409 U.S. 540, 93 S.Ct. 883, 35 L.Ed.2d 62 (1973). See 3 B. J. Moore, Federal Practice, ¶23.10-1, n. 8 (2d ed. 1971)." (94 S.Ct. at 676)

There can be no remaining financial interest at stake when the plaintiff has recovered all that he claims or the law allows. There is absolutely no plaintiff before the Court who has not received full satisfaction. There is nothing real or "direct" in a residual "nexus", when financial interest is gone.

The concept of a self-styled class representative whose self-appointed status is rejected, may lose "personal respect and credibility" for having received satisfaction is no more than an emotional approach, and this is not enough to meet the case or controversy requirement, as was held in *Ashcroft* v. *Mattis*, 97 S.Ct. 1739 (1977):

> ". . . Emotional involvement in a lawsuit is not enough to meet the case or controversy requirement; were the rule otherwise, few cases could ever become moot." (97 S.Ct. at 1740)

The emotional test, so thus rejected by this Court, is on somewhat of a parity with the undefinable "nexus" test embraced by the Court of Appeals.

When challenged, jurisdiction must rest upon facts alleged and proven and the party asserting jurisdiction has the burden of proof and persuasion. *McNutt* v. *General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 56 S.Ct. 780 (1936).

This burden of proving a continuing personal money stake in the case has not been met and the decision of the Court of Appeals can stand only if the "personal stake" test is abandoned in favor of the undefinable "nexus" test as adopted by the Fifth Circuit.

No attempt has been made by respondents to discuss the remaining questions tendered by the Petition.

Respectfully submitted,

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